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ARGUMENT OF [illegible] ON BEHALF OF A. THERIOT

H. EVERETT

Attorney for Richard A. Firmature, Appellee.

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OKLAHOMA CITY, OKLA.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1905

WILLIAM M. ESTES,
Appellant.

vs.

RICHARD A. TIMMONS,
Appellee.

No. 74.

ARGUMENT ON BEHALF OF RICHARD A. TIMMONS.

May it please the Court.

This is a suit in equity to declare a resulting trust on land formerly a part of the public domain, on the theory that the patent has been erroneously awarded to the appellee, it being averred that the land department should have awarded the land to the appellant.

The land in controversy is eighty acres formerly a part of the Sac & Fox Indian Reservation, in Indian Territory, now Oklahoma, and the petition discloses the fact that the land was originally entered by the appellant, William M. Estes. A contest was initiated against the entry by the appellee, Richard A. Timmons, on the ground of prior settlement, which the petition avers resulted in the cancellation of the entry of the said Estes, and the homesteading of said land by the said Timmons. No copy of the decision of the Land Department, awarding this land to Timmons, nor copy of the evidence in this first contest is plead or attached to the petition.

After this contest had been concluded and Timmons had made entry of the land, the appellant, William M. Estes, filed a contest for a preference right on the 26th day of September, 1894, alleging in effect that the appellee here, Richard A. Timmons, had entered upon, and occupied said land and other parts of said land embraced in the Sac & Fox Indian Reservation, prior to 12 o'clock noon of September 22nd, A. D., 1891, and subsequent to September 18th, A. D., 1891. The petition of the plaintiff in the court below alleges that a hearing was ordered upon this allegation, that testimony was taken in support of said charge, on behalf of Estes, and in rebuttal thereof, on behalf of Timmons, and that the Register and Receiver found

that the appellant, Estes, had not sustained his allegations by a preponderance of the evidence, and recommended a dismissal of the contest.

That thereupon, said Estes filed his motion for a new trial, based upon certain affidavits attached thereto, that this motion for a new trial was overruled and disallowed by the Register and Receiver, and that upon appeal, the Commissioner of the General Land Office affirmed the decision of the Register and Receiver, and that upon further appeal the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, closed the case and finally issued patent to the appellee, Richard A. Timmons. The petition avers that Timmons and all his witnesses committed perjury in the trial of this case before the Land Department.

To the petition as amended, making these averments, the appellee filed a general demurrer in the court of first resort, on the ground that the petition of the plaintiff did not state facts sufficient to constitute any cause of action against the defendant.

The District Court of Pottawatomie County, sustained the demurrer and rendered decision, dismissing the case. From this decision and judgment the appellant, Estes, duly perfected an appeal to the Supreme

Court of the Territory of Oklahoma, and on June 6, 1903, the Supreme Court of the Territory of Oklahoma, handed down its decision affirming the decision of the lower court.

The appellant brings the case here on appeal.

I think that there are four reasons sufficient to justify the court in sutaining the demurrer of the appellee to the petition of the plaintiff in error:

First: The petition of the plaintiff shows a want of equity in this, that the plaintiff nowhere shows in said petition that he has earned patent to the land in controversy, by five years' residence, cultivation and improvements thereon, and he therefore appears as a mere unsuccessful contestant for a preference right of entry under the second section of the Act of May 14, 1880. It is true that in his petition in the court below, on page 11 of the printed record, he says:

"Plaintiff further alleges that he has fully complied with the homestead laws of the United States, in his settlement, residence, improvement and cultivation of said last named tract of land, and that he has fully earned a title thereto, and the same is of the value of Sixteen Thousand Dollars."

This is a mere conclusion of law, and not the statement of any fact or facts from which this or any other court could conclude that the appellant had in fact earned title to this land, or the right to a patent.

The Supreme Court of the United States in case of Bohall vs. Dilla, 114 U. S., 47-51 (Law Ed. Vol. 29, page 61) holds:

"To charge the holder of legal title to land under a patent, as trustee of another, the claimant must show himself entitled to it, and its refusal to him in consesquence of errors in the rulings of the Land Department under the law applicable to the facts found. It is not sufficient to show that there may have been error in adjudging the title to the patentee."

Of like tenor is Sparks vs. Pierce, 115th U. S., pages 408-413 (Law Ed., Vol. 29, page 429.)

The Supreme Court of the Territory of Oklahoma, specifically held in Baldwin vs. Keith, 75 Pac. Rep., page 1124, that:

"In an action to declare a resulting trust where the plaintiff claims the land under the homestead laws an essential averment of the petition, and one without

which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated and improved the land for a period of time and to an extent that upon final proof he would be entitled to the patent thereto."

The appellant, Estes, being merely an unsuccessful contestant for a preference right, can not question the judgment of the Land Department in a suit in equity, to declare a trust, and this court has so held in case of Emblen vs. Lincoln Land Co., 184 U. S., 661-663 (Law Ed. Vol. 46, page 737.) That the appellant, Estes, has no vested interest in this land is clear.

Graham vs. Great Falls Water Power & Townsite Co., 76 Pac., 808.

Second: This being a suit in equity, the plaintiff, to maintain it, must offer to do equity. Nowhere in the petition does the appellant offer to pay the appellee, Timmons, the monies expended by him in obtaining title to the tract of land, such as the purchase price, fees and commissions, paid the government, etc., nor does he make any general offer to do equity, which in general terms might satisfy this requirement of a bill in equity. In Thornton vs. Peery, 54 Pac. 649-652, the Supreme Court of the Territory of Oklahoma finds that Thornton failed to aver "that the plaintiff had ten-

dered or offered to pay the Land Office fees for final proof, paid by Peery, nor does he offer to pay same into court," and held in effect that this was a material averment to be made in order to sustain such a bill. This is consonant in principal with the decision of this court in McQuiddy vs. Ware, 20th Wall, 14 (Law. Ed. Vol. 22, page 311).

Third: The petition of the plaintiff in the court below stated no cause of action for the reason that the appellee seeks to overturn a decision of the Secretary of the Interior, and said appellee does not exhibit or set out in any way the decision complained of. This is a fatal defect to the petition. It can not be contended that the decision of the Land Department was wrong upon the evidence in the record taken at the trial before the Register and Receiver. It was conflicting, but the preponderance was with the appellee here. The contestant there, appellant here, sought a new trial on the ground that the witnesses for the defendant there, had committed perjury. This prayer for a new trial the Register and Receiver denied, the Commissioner reiterated such denial, and the Secretary of the Interior affirmed such action. In order to determine whether or not this was an error the findings and decision of the Secretary must necessarily be plead.

Myers v Berry, 41 Pac., 581.
Thornton vs. Peery, 54 Pac. 651.

In this latter case the Supreme Court of the Territory of Oklahoma says:

"And the failure to set out and plead the findings of fact made by the land officers in a contested case, renders the petition so defective as to prevent the court from determining whether there was any misapplication of the law. Pleading all the evidence does not supply this lack of material averments, but, on the contrary, is an aid to the demurrer in this cause, as it appears that there was abundant evidence other than the alleged false testimony on which a finding might have been based."

In the case at bar no affidavits were produced impeaching any of the witnesses except the one witness, John C. or J. C. Eaton. There was abundant evidence in the record as exhibited by plaintiff's petition, to warrant the Land Department in finding the issues for the appellee, Timmons, aside from the evidence alleged to be perjured.

Again, the petition nowhere alleges that the appellee, Timmons, did not file counter affidavits before

the Land Department, resisting the motion for a new trial, which satisfied the Land Department that there was no merit in the motion for a new trial.

In view of the evidence attached to the petition, showing that Boiling received a note and mortgage for Five Hundred Dollars for his testimony (see page 67 of the record), and in view of the lack of definiteness in the testimony of Adair, as shown by the cross examination of said witnesses, on pages 58, 59 and 60 of the record, the Secretary may well have held that the contestant, Estes, had not even made out a prima facie case against the appellant, Timmons, which required rebuttal or the interposition of any defense. In other words, without the decision of the Secretary of the Interior, the court would be entirely at sea in passing upon the case, and would have to go into the boundless realm of suspicion and conjecture to infer an error of law, in order to correct it.

Fourth: But the controlling reason for the sustaining of the demurrer is the one given by the Supreme Court of the Territory of Oklahoma, in their decision, to-wit: that,

"The frauds for which a bill in chancery will be sustained to set aside a judgment or decree between

the same parties rendered by a court of competent jurisdiction, or special tribunal, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in the former suit." (Record Pages 138 to 144).

The cases cited by the court, are to my mind conclusive of the legal proposition enunciated.

The fact inquired into by the Land Department in this original contest, was whether or not Timmons, the appellee, committed perjury in swearing that he did not enter the Sac & Fox lands prior to noon, September 22, 1891. The appellant, Estes, introduced testimony in support of this allegation, and the appellee introduced evidence in rebuttal. Appellant thereupon alleged in his motion for a new trial that a witness of Timmons' had committed perjury in swearing on behalf of Timmons. The department in the exercise of its discretion denied the motion for a new trial, and issued a patent to Timmons. The whole controversy from beginning to end involved the determination of a pure question of fact, and of fact only, and the courts have no jurisdiction to review the findings of the Land Department in such case.

In the case of United States vs. Throckmorton, 8th Otto, 61-67 (Law. Ed. Vol. 25, page 93,) the court says:

"We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity were in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

In Vance et al., vs. Burbank et al., 11th Otto, 514-621 (Law. Ed. Vol. 25, page 929) this court says:

"As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been presented to the

Land Department and, therefore, is concluded by the decision of that tribunal. Under these circumstances, it would be gross injustice to attempt to open that inquiry at this late day, in favor of Scott himself, or any one claiming under him upon his own title, irrespective of any his wife may have had."

It is to be observed that a sharp distinction is to be made between those cases, in which the showing by the successful claimant was ex parte, as in Lindsay vs. Hass, 2 Black, 554 (Law. Ed. Vol. 17, 265), and the case at bar, where both parties were present in person and by their attorneys, where the questions presented were all fully and freely investigated by the Land Department, and where the only complaint is, that the land officers believed the appellee and his witnesses and refused to believe the appellant's witnesses.

This court has fully discussd and distinguished the application of the rule enunciated in the above case of United States vs. Throckmorton and Vance et al., vs. Burbank et al., in the case of the United States vs. Minor, 114 U. S. 233-244 (Law. Ed. Vol. 29, pages 110-114).

In this latter case the court said:

"So, also, as regards the case of Vance v. Burbank

(supra), the language of the court in regard to the conclusiveness of the decision of the land office must be considered with reference to the case before it. That was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of the Land Department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers. In such a case, where there was a full hearing, rehearing, and issues made and tried the observation of the court, "that the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," is well founded.

"It has been often said by this court that the land officers are a special tribunal of a quasi judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, those parties are concluded as to all the facts thus in issue by the decision of the officers."

In a very early case the Supreme Court of the State of Minnesota, was called upon to pass upon this same proposition and in State v. Bachelder, 5th Minn., page 223 (80 American Dec., page 410) they found that:

"If the plaintiff had notice, and contested, or had an opportunity to contest and did not take advantage of it, the admission of false testimony would not be sufficient ground for relief, because, as before shown, the privileges of cross examination and impeachment are ample protection against such practices. If the plaintiff was aware of the decision of the land office at any time during the pendency of the matter therein, an application to any of the land officers in whose department the case might have been, setting forth the facts, would have procured a rehearing and detection of the fraud. If the plaintiff knew of the decision against its interest, and allowed the time to elapse in which it could have obtained relief in the same court without appealing to that tribunal, I think its negligence is a good answer to an action of this nature. There can be very little doubt that if the case was still pending in the land office, this court would turn the plaintiff over to that tribunal for relief, because it would have ample power to grant it. It is only when the plaintiff, without any default of his own, is placed in a position that the law courts can not afford him adequate redress, that this court will interfere, and

for the purpose of this investigation we must place the land department of the United States in the category of law courts."

If the contention of the appellant is correct it is hard to conceive of any case in which there was a conflict of testimony at the trial, where the defeated party could not demand a second trial on the allegation that the prevailing party's witnesses had committed perjury, and trial could succeed trial on such issue, with practically no end to the litigation.

In the case at bar there is no allegation that the plaintiff in this action did not have a fair trial before the Land Department, and the exhibits attached to the petition would have negatived any such allegation, if made, as said exhibits show that the plaintiff was present with his attorneys before the land office, at all stages of the proceedings, that he cross-examined the defendant's witnesses, introduced testimony in his own behalf, prosecuted his case by successive appeals to the department, made a motion for a new trial, and complained of the alleged perjury to the Land Department, and had a fair chance and full opportunity to assert his right to the land in question before that tribunal.

I urge that the appellant is cut off and concluded

by the decision of the Land Department on the merits, and that the decision of the court below was right and should be affirmed.

J. H. EVEREST,
Attorney for Richard A. Timmons, Appellee.